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(2)

समक्ष माननीय उच्च न्यायालय मध्यप्रदेश जबलपुर खंडपीठ जबलपुर,

क्रिमनल अपील 2072/2000

क्रिमनल अपील अन्तर्गत धारा 374 (2) दंडप्रक्रिया संहिता

अपीलार्थी :- ---- विष्णुराम आत्मज घुरऊ सतनामी
(जेल में) आयु लगभग- 37 वर्ष निवासी- डोंगरी
पाली थाना बारा, बहरा जिला,
महासमुंद (म0प्र0)

विरुद्ध

प्रत्यर्थी ---- मध्यप्रदेश शासन,

दोष सिद्धि	दंड
अन्तर्गत धारा 302 भा0दं0सं0	आजीवन कारावास एवं दस हजार रुपए का अर्थदण्ड, अर्थदण्ड अदा न करने पर 6 माह का अतिरिक्त साधारण कारावास ।

अपीलार्थी माननीय न्यायालय से है कि समस्त संबंधित प्रकरण

(39)

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..... **विरुद्ध** .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench:
Hon'ble Shri Justice L.C.Bhadoo, &
Hon'ble Shri Justice V.K. Shrivastava,JJ.

05/10/2006

Smt. Uma Tiwari, counsel for the appellant.

Shri G.D. Vaswani, Additional Public Prosecutor with Shri U.K.S Chandel, Panel Lawyer for the State.

Oral judgment dictated on *Dais.*

PER L.C. BHADOO, J.

This appeal is directed against the judgment of conviction and order of sentence dated 26/06/2000 passed by IInd Additional Sessions Judge, Mahasamund, in Sessions Trial No. 321/99 whereby learned Additional Sessions Judge after holding the accused/appellant guilty for commission of the offence under Section 302 of the IPC, for committing murder of Heeraman and Sonaibai, sentenced him to undergo imprisonment for life and to pay a fine of Rs.10,000/-, in default of payment of fine to further undergo S.I. for six months.

The case of the prosecution, in brief, is that on 25/06/1999 when the accused was returning from his agricultural field, Deen Bandhu, Heeraman and Sonai Bai were standing in front of their house holding lathis in their hands. Deen Bandhu assaulted Vishnu with lathi on his head as a result of which he sustained injury on the head, thereafter accused snatched the said lathi from Deen Bandhu. When Deen Bandhu entered his house, accused

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -2-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

assaulted Heeraman and Sonai Bai with said lathi, as a result of which Heeraman fell down, thereafter accused attacked 4 – 5 times with axe on the neck of Heeraman, as a result of which he died on the spot. Accused also attacked Sonai Bai with the same axe on her neck as a result of which she also died on the spot. Thereafter, accused informed village Kotwar Sakharam about the incident that he has murdered his sister and brother-in-law namely Sonai Bai and Heeraman, at that time, accused was carrying blood stained axe with him and there was blood on his clothes. Village Kotwar Sakha Ram informed the village Panchas Asharam, Gyan Das and others. They went to the place of occurrence, saw the bodies of Heeraman and Sonai Bai and also saw the injuries present on their bodies. Panchas asked the accused to hand over the weapon of offence (axe) to village Kotwar Sakha Ram, on which accused gave the axe to Kotwar. The matter was reported in the Police Station: Baghbahara by PW/1 Sakha Ram. Merg intimation No.23 of 99 regarding death of Heeraman and merg intimation No. 24 of 99 regarding death of Sonai Bai were given in the Police Station Baghbahara on which first information report (Ex.P/2) for commission of offence under Section 302 of the IPC was registered. The Investigating Officer P.P.Singh (PW/13) seized the blood stained axe, weapon of offence under Ex.P/4 and also seized the blood stained clothes of the accused under Ex.P/5. The Investigating Officer prepared site plan of place of occurrence under Ex. P/6. Site plan of place of occurrence (Ex.P/7) was also

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prepared by Patwari. The blood stained soil and blood stained clothes of the accused were taken into possession under Ex.P/8 & P/9 from the place of occurrence. The inquest report (Ex.P/10) of the body of Heeraman and inquest report (Ex.P/11) of the body of Sonai Bai were prepared by the Investigating Officer. The body of Heeraman was sent for postmortem examination to the Government Hospital, Baghbahara under Ex.P/16 where Dr. C.S. Mishra (PW/16) conducted the postmortem and opined that death of Heeraman was as a result of shock due to injuries sustained over the neck and it was homicidal in nature. The body of Sonai Bai was sent for postmortem examination to the Government Hospital, Baghbahara under Ex.P/18 where Dr. C.S. Mishra (PW/16) conducted the postmortem and opined that death of Sonai Bai was as a result of shock (syncope) due to injuries sustained over the neck and it was homicidal in nature. The seized articles were sent for chemical examination to Forensic Science Laboratory, Raipur under Ex.P/20 from where report (Ex.P/21) was received. The papers relating to 5 years Khasra of land ~~under~~ Ex.P/22, P/23, P/24 and P/25 were taken into possession by the Investigating Officer.

After completion of the investigation, charge-sheet was filed in the Court of Chief Judicial Magistrate, Mahasamund, who in turn committed the case to the Sessions Judge, Raipur, from where he received the case for trial.

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The prosecution in order to establish the charge against accused examined sixteen witnesses. Statement of the accused was recorded under Section 313 of the Cr.P.C. in which he denied the material appearing against him in the prosecution evidence and stated that he is innocent and he has been falsely implicated in the crime.

Learned Sessions Judge after hearing the arguments of Additional Public Prosecutor and counsel for the accused/appellant, convicted and sentenced the accused as mentioned in para one of this judgment.

Learned counsel for the appellant has not disputed the homicidal death of Heeraman and Sonai Bai. Apart from that, as per the evidence of eyewitness Deen Bandhu (PW/2) who has stated that accused Vishnu assaulted his father Heeraman and mother Sonai Bai, as also the evidence of PW/16 Dr. C.S. Mishra, who conducted postmortem on the bodies of Heeraman and Sonai Bai, has stated that there were five incised wounds on the neck of Heeraman and he died on account of injuries on the neck and death was homicidal. He has further stated that he conducted postmortem on the body of Sonai Bai, there were five incised wounds on the neck of Sonai Bai and she died on account of the injuries on the neck and death was homicidal. In view of the above ocular and medical evidence, it is established that death of Heeraman and Sonai Bai was homicidal in nature.

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As far as involvement of the accused in commission of the crime in question is concerned, learned counsel for the accused/appellant argued that the accused attacked the deceased persons in his right of private defence. When he was returning from agricultural field and passing through the street in front of the house of the deceased persons, they were standing in front of their house holding lathis in their hands. When Deen Bandhu assaulted him with lathi on his head, he sustained injury, he snatched the lathi from Deen Bandhu and thereafter attacked Heeraman and Sonai Bai, therefore, this is a case of exceeding the right of private defence, as such offence against the accused/appellant does not travel beyond Section 304 Part II of the IPC.

On the other hand, Shri G.D. Vaswani, Additional Public Prosecutor supported the judgment of the trial Court.

Having heard learned counsel for the parties, we have perused the evidence available on record. Conviction of the accused/appellant rests on the ocular evidence of PW/2 Deen Bandhu, extra judicial confession made by the accused before PW/1 Sakha Ram, PW/3 Sadram, PW/4 Prem and PW/5 Ganeshram, also the circumstantial evidence that the clothes of the accused were found stained with blood and the axe, weapon of the offence, which he handed over to village Kotwar was taken into possession by the Investigating Officer was also stained with blood.

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PW/2 Deen Bandhu, who is son of the deceased persons, has stated that on the fateful day, at the time of incident, he was at his residence, at that time, accused came and assaulted his father as a result of which his father fell down. When his mother intervened, he pushed her as a result of which she fell down, thereafter attacked his mother with axe which was witnessed by him. The accused/appellant also attacked his father with axe and he sustained injuries on the neck. He has further stated that there was dispute regarding partition of land between his parents and the accused. The above ocular evidence of PW/2 Deen Bandhu has been corroborated by extra judicial confession made by the accused before village Kotwar PW/1 Sakharam, who has stated that on the fateful day when he was at his residence accused came to his house and informed him that he has murdered his sister (Sonai Bai) and brother-in-law (Heeraman). The blood was oozing from his head, on which he informed the Panchas and took them to the place of occurrence, accused/appellant also came there with axe which was handed over to him on asking by Panchas and the matter was reported by him to Police. Similar is the evidence of PW/3 Sadram who has also stated that the accused/appellant made extra judicial confession before them and has stated that accused was carrying blood stained axe in his hands and the clothes of the accused were stained with blood. Similar is the evidence of PW/4 Prem and PW/5 Ganeshram that the accused made extra judicial confession before them. All these witnesses

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are independent witnesses and there is no reason for these witnesses to implicate the accused/appellant in a false case. The extra judicial confession made by the accused/appellant before these witnesses was voluntary and true, as the same has been corroborated by ocular evidence of PW/2 Deen Bandhu and also the fact that the clothes of the accused were stained with blood, he also handed over the axe, weapon of the offence and the Panchas went to the place of occurrence where they saw the dead bodies of Heeraman and Sonai Bai. Therefore, involvement of the accused in commission of crime in question is established.

Now, coming to the question of right of private defence, in order to exercise the right of private defence burden was on the accused, as the provisions of Section 105 of the Indian Evidence Act which envisages that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances. It is true that the primary burden was on the prosecution to prove the ingredients of the offence and thereafter the accused was to discharge burden under Section 105 of the Indian Evidence Act by adducing oral or documentary evidence, even by bringing the facts on record in cross-examination of the prosecution witnesses regarding the right of private defence of person.

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In order to ascertain the veracity of the argument advanced by learned counsel for the accused/appellant based on the evidence available on record, accused/appellant has not been able to establish his right of private defence. In the first instance, accused/appellant has not adduced any evidence in his defence for establishing the right of private defence, even in his statement recorded under Section 313 of the Cr.P.C., he has not stated that he attacked the deceased persons in his right of private defence of person, even by cross-examining the prosecution witnesses the defence regarding the right of private defence has not been raised. The Investigating Officer, P.P. Singh (PW/13) has not been cross-examined on this aspect that the deceased persons in any way attacked the accused and in right of private defence of person he attacked them. Similarly other prosecution witnesses, eye-witness or the persons before whom the accused/appellant made extra judicial confession, have not been cross-examined in order to establish the right of private defence. Even the prosecution story has not been established by legal evidence by cross-examining the witnesses. Even if the prosecution story is accepted as it is, the prosecution story is that, as argued by learned counsel for the accused/appellant, PW/2 Deen Bandhu assaulted the accused with lathi, accused snatched the lathi from Deen Bandhu and Deen Bandhu ran away. There is nothing on record to show that the deceased persons Heeraman and Sonai Bai in any manner attacked the accused or attempted to attack the accused,

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therefore, there was no occasion for the accused to assault the deceased persons with lathi which was snatched from Deen Bandhu. Moreover, when they fell down, the accused attacked them with the axe which he was carrying, therefore, he attacked 4-5 times to each deceased persons. In the matter of right of private defence, accused was entitled to attack the complaint party/deceased party by using of force to the extent which was necessary for protection of his person. When Heeraman and Sonai Bai fell down, thereafter there was no occasion for the accused to attack Heeraman and Sonai Bai with axe. As such, for the foregoing reasons, argument advanced by counsel for the accused/appellant regarding the right of private defence is devoid of merit and cannot be accepted.

For the foregoing reasons, we do not find any illegality or infirmity in the judgment of conviction and order of sentence passed by the trial Court.

In the result, the appeal fails and the same is dismissed.

Sd/-
L.C.BHADOO
Judge

Sd/-
V.K.Shrivastava
Judge

Raju

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